Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1976

No. 76-512

THELMA B. STANTON,
Appellant,

vs.

JAMES LAWRENCE STANTON, JR.,
Appellee.

On Appeal from the Supreme Court of the State of Utah

MOTION TO DISMISS

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TABLE OF CONTENTS

Page

OPINION BELOW 1

FACTS 1

POINT I

THE APPEAL FROM THE UTAH SUPREME COURT DECISION DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION 4

POINT II

DETERMINATION OF THIS APPEAL, OTHER THAN A DISMISSAL, WOULD VIOLATE THIS COURT'S POLICY AGAINST PREMATURE CONSTITUTIONAL ADJUDICATIONS 10

POINT III

APPELLANT'S CLAIM FOR COSTS AWARDED BY THIS COURT IS MOOT 12

CONCLUSION 13

APPENDIX 1a

CASES CITED

Alabama State Federation of Labor v. McAdory, 325 U.S. 450, 461, 65 S.Ct. 1384, 89 L.Ed. 1725 (1945).... 11

Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 341, 345, 348, 56 S.Ct. 466, 80 L.Ed. 688, 707, 709, 711-712 (1936)..... 11

Cohens v. Virginia, 19 U.S. 120, 6 Wheat 264 (1821)..... 10

Commercial Cable Co. v. Burleson, 250 U.S. 360, 39 S.Ct. 512, 63 L.Ed. 1030 (1919) 13

Dorchy v. State of Kansas, 264 U.S. 286, 44 S.Ct. 323, 68 L.Ed. 686, 689-690 (1924) 8

TABLE OF CONTENTS — (Continued)

Page

Electric Bond & Share Co. v. S.E.C., 303 U.S. 419, 58 S.Ct. 678, 82 L.Ed. 936 (1938) 11

Ex Parte Baez, 177 U.S. 378, 390, 20 S.Ct. 673, 44 L.Ed. 813 (1900) 12

Giles v. Harris, 189 U.S. 475, 486, 23 S.Ct. 639, 47 L.Ed. 909 (1903) 11

Hagans v. Lavine, 415 U.S. 528, 536-537, 94 S.Ct. 1372, 1378-1379, 39 L.Ed. 2d 577 (1974) 4

King v. State of West Virginia, 216 U.S. 92, 30 S.Ct. 225, 54 L.Ed. 396, 401 (1910) 8

Martin v. Hunter's Lessee, 14 U.S. 121, 1 Wheat 304 (1816) 10

A. L. Mechling Barge Lines v. United States, 368 U.S. 324, 82 S.Ct. 337, 7 L.Ed. 317 (1961) 13

Republic Natural Gas Co. v. Oklahoma, 334 U.S. 62, 68 S.Ct. 972, 92 L.Ed. 1212, 1221 (1947) 11

S.E.C. v. Medical Committee for Human Rights, 404 U.S. 403, 92 S.Ct. 577, 30 L.Ed. 560 (1972) 13

Stanton v. Stanton, 421 U.S. 7 (1975) 2

STATUTES CITED

Rule 16(b), Supreme Court Rules 4

Rule 31, Supreme Court Rules 14

Section 15-2-1, Utah Code Annotated (1953) 2, 4, 7, 9, 10

28 United States Code, Section 1257(2) 13

28 United States Code, Section 1651(a) 14

28 United States Code, Section 2103 14

CONSTITUTIONAL PROVISIONS

Article VI, Clause 2, United States Constitution 9

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THELMA B. STANTON,
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On Appeal from the Supreme Court of the State of Utah

MOTION TO DISMISS

OPINION BELOW

The opinion of the Supreme Court of the State of Utah is reported at 552 P.2d 112 (1976) and is set forth in the Appendix, *infra*, pages 1a through 12a.

FACTS

This case arises from a Decree of Divorce entered November 29, 1960 in the District Court of Salt Lake County, State of Utah, which awarded to appellant the care and custody of the minor children, Sherri Lyn and Rick Arlund and which ordered appellee to pay appellant One Hundred Dollars ($100.00) per month per child as

child support. On February 22, 1971, Sherri Lyn attained the age of eighteen whereupon appellee discontinued payments for her support.

On May 22, 1973 appellant filed a Motion for Judgment seeking recovery of the alleged delinquencies from February 22, 1971. The district court denied this Motion.

Appeal from this decision was taken to the Utah State Supreme Court on January 4, 1974, where the judgment of the lower court was affirmed. A Petition for Rehearing was denied on January 30, 1974.

Appellant appealed to this Court on the ground that 15-2-1, Utah Code Annotated (1953) violated the Fourteenth Amendment to the Constitution of the United States in that it discriminated against females because of their sex and, therefore, denied them equal protection of the laws. Notice of Appeal to this Court was filed on March 5, 1974.

This Court on April 15, 1975, entered its opinion in *Stanton v. Stanton,* 421 U.S. 7 (1975) holding that 15-2-1, Utah Code Annotated (1953) was unconstitutional. It reversed the decision of the Utah Supreme Court and remanded the case to the Utah Supreme Court for its determination of when appellee's obligation for his children's support, pursuant to a divorce decree, terminates under Utah law. The mandate awarded appellant the sum of Four Hundred Thirty-Seven and 38/100 Dollars ($437.38) for her costs of the appeal.

On June 6, 1975, appellant moved the Utah Supreme Court for a review of this Court's mandate, but the case was remanded, without directions, to the District Court of Salt Lake County for further proceedings.

On September 10, 1975, the district court determined that for purposes of support, children attain their majority at age 21, and entered an amended judgment for appellant in the amount of Two Thousand Seven Hundred Dollars ($2,700.00) as past due support money, together with interest thereon in the amount of Five Hundred Eight and 80/100 Dollars ($508.80), and Four Hundred Thirty-Seven and 38/100 Dollars ($437.38) awarded to appellant for her costs by this Court.

This judgment was appealed to the Utah Supreme Court and on June 23, 1976, that court reversed the district court's judgment.

The only question ever before any court was child support for the girl. Never, at any stage of these extended proceedings — State District Court, Utah Supreme Court or United States Supreme Court, — was child support for the boy ever in question. The Utah Supreme Court decided that for purposes of child support the age of majority for females is age 18 and that decision, by necessary implication, set the age of majority for males for the purpose of child support at age 18. The lower state courts have so interpreted the Utah Supreme Court decision and are now ruling in accordance with that interpretation.

Appellant's Petition for Rehearing was denied on July 14, 1976. Notice of Appeal to this Court was filed in the District Court of Salt Lake County, State of Utah, on September 29, 1976. Appellee received the Jurisdictional Statement on October 12, 1976.

POINT I

THE APPEAL FROM THE UTAH SUPREME COURT DECISION DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION.

Appellant contends that the Utah Supreme Court revalidated the constitutionality of former 15-2-1, Utah Code Annotated (1953) in violation of the mandate and decision of this Court, thereby raising a substantial federal question. On the contrary, not only does the state court decision not present a substantial federal question, but that ruling complied with the mandate and decision of this Court, the equal protection clause and the supremacy clause.

Rule 16(b) of the Supreme Court Rules states in pertinent part that:

> "The court will receive a motion to dismiss an appeal from a state court on the ground that it does not present a *substantial federal question; . . .*" [Emphasis added.]

Attempts to define "substantial federal question" are legion; however, an outstanding synopsis of those decisions is provided by Justice White in *Hagans v. Lavine,* 415 U.S. 528, 536-537, 94 S.Ct. 1372, 1378-1379, 39 L.Ed. 2d 577 (1974):

> "The principle applied by the Court of Appeals — that a 'substantial' question was necessary to support jurisdiction — was unexceptionable under prior cases. Over the years the Court has repeatedly held that the federal courts are without power to entertain claims otherwise within their jurisdiction if they are 'so attenuated and unsubstantial as to be absolutely devoid of merit.' *Newburyport Water Co. v. Newburyport,* 193 U.S. 561, 579, 24 S.Ct. 553, 557, 48 L.Ed. 795 (1904); 'wholly insubstantial,' *Bailey v.*

> *Patterson,* 369 U.S. 31, 33, 82 S.Ct. 549, 550-551, 7 L.Ed.2d 512 (1962); 'obviously frivolous,' *Hannis Distilling Co. v. Baltimore,* 216 U.S. 285, 288, 30 S.Ct. 326, 327, 54 L.Ed. 482 (1910); 'plainly unsubstantial,' *Levering & Garrigues Co. v. Morrin,* 289 U.S. 103, 105, 53 S.Ct. 549, 550, 77 L.Ed 1062 (1933); or 'no longer open to discussion,' *McGilvra v. Ross,* 215 U.S. 70, 80, 30 S.Ct. 27, 31, 54 L.Ed. 95 (1909). One of the principal decisions on the subject, *Ex parte Poresky,* 290 U.S. 30, 31-32, 54 S.Ct. 3, 4-5, 78 L.Ed. 152 (1933), held, first, that '[i]n the absence of diversity of citizenship, it is essential to jurisdiction that a substantial federal question be presented'; second, that a three-judge court was not necessary to pass upon this initial question of jurisdiction; and third, that '[t]he question may be plainly unsubstantial, either because it is "obviously without merit" or because "its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the question sought to be raised can be the subject of controversy." *Levering & Garrigues Co. v. Morrin, supra; Hannis Distilling Co. v. Baltimore,* 216 U.S. 285, 288, 30 S.Ct. 326, 54 L.Ed. 482; *McGilvra v. Ross,* 215 U.S. 70, 80, 30 S. Ct. 27, 54 L.Ed. 95. . . .' "

That explanation of "substantial federal question" applied to the facts of this case supports the conclusion that a substantial federal question does not exist because when the Utah Supreme Court held that in the context of child support the age of majority for females is age 18, that, by necessary implication, established an identical age limit for males, thereby erasing any question of equitable or equal protection that might have existed. In short, the previous decisions of this Court, together with the state court decision, "foreclose the subject and leave no room for the inference that the question sought to be raised

can be the subject of controversy." At this point in time, the appellant's claim is so "attenuated and unsubstantial" as to be devoid of merit. Witness the following analysis of the mandate and decisions of this Court and the subsequent state court decision.

This Court remanded the case in order that the state court could determine:

> "*when* the appellee's obligation for his children's support, pursuant to the divorce decree, terminates under Utah law."

The Court ruled that:

> "'• • • under any test — compelling state interest, or rational basis, or something in between — § 15-2-1, in the context of child support does not survive an equal protection attack. In that context, no valid distinction between male and female may be drawn.'"

On remand, in the District Court of Salt Lake County, State of Utah, Judge James S. Sawaya held that:

> ". . . for purposes of child support, children attain their majority at age 21"

and

> ". . . ORDERED . . . that the plaintiff . . . recover from the defendant the sum of $2,700.00 as past due support money for the parties' daughter . . . together with interest thereon . . . and the sum of $437.38 awarded to her as costs by the United States Supreme Court. . ."

The exact basis for the trial court's action is not given; however, its judgment can be sustained under either of two theories presented by Justice Maughan in his dissent to the Utah Supreme Court decision.

> "Under one theory, if the statute be deemed void, the common law 'shall be the rule of decision in all courts of this state.' (68-3-1) Under the common law both male and female attain their majority at the age of 21 years.
>
> "Under the second theory, rather than invalidating the entire statutory scheme, where a classification had the affect of unreasonably granting a benefit to one class and denying it to another, the benefit may be extended to the excluded class. . . ."

The Utah Supreme Court appropriately reversed the trial court, rejected the notion that for purposes of child support the age of majority is 21 for males and females; and held that the defendant's obligation to support his daughter, Sherri Lyn, pursuant to the Divorce Decree terminated under Utah law at age 18. In that decision, written by Justice Ellett for the majority, the court determined that the constitutional infirmity of Section 15-2-1, Utah Code Annotated (1953) did not necessarily invalidate the statute in its entirety and proceeded to justify its conclusion in the following manner:

(1) That the only issue directly before the court was the age limit at which the defendant's obligation to support his daughter, Sherri Lyn, pursuant to the Divorce Decree, terminates under Utah law and its corollary whether the supplying spouse had a right to past due support money.

> "'. . . The age of the male child in this divorce case has never been called into question. Counsel for the ex-wife raises a question as to when the girl child became of age. . . .'"

(2) That former Section 15-2-1, Utah Code Annotated (1953) was comprised of two mutually independent pro-

visions ["Obviously the two provisions of the statute are separable . . ."]; namely, that

> " 'The period of minority extends in males to the age of 21 years and [the period of minority extends] in females to that of [age of] 18 years; . . .' "

(3) That applying the rule of construction recognized and articulated in *Dorchy v. State of Kansas,* 264 U.S. 286, 44 S.Ct. 323, 68 L.Ed 686, 689-690 (1924); namely, that:

> ["A statute bad in part is not necessarily void in its entirety. Provisions within the legislative power may stand, if separable from the bad. . . . But a provision inherently unobjectionable, cannot be deemed separable unless it appears both that, standing alone, legal effect can be given to it, and that the legislature intended the provision to stand, in case others included in the act and held bad should fall. . . . provides a rule of construction which may sometimes aid in determining that intent. But is an aid merely; not an inexorable command."

See also, *King v. State of West Virginia,* 216 U.S. 92, 30 S.Ct. 225, 54 L.Ed. 396, 401 (1910). The Utah Supreme Court, as long as it was consistent with the mandate and decision of this Court, was entitled to validate constitutional provisions of the statute separable from portions of the statute found to be unconstitutional.

(4) That, standing alone, legal effect could be given to that portion of the statute which terminates the obligation to support female children, pursuant to a Divorce Decree, at age 18:

> " '. . . The Supreme Court never held that she did not become of age when she reached the age of 18 years. . . .

> " '. . . One looks in vain for some provision of the Constitution which says a girl does not become of age at age 18, and so we must hold that a girl does reach her majority at that age.' "

that the Utah legislature intended that portion of former Section 15-2-1, Utah Code Annotated (1953) to stand:

> "The Legislature of Utah, in an attempt to satisfy the justices of the Supreme Court of the United States, passed an amendment to Section 15-2-1, U.C.A., 1953, so that it now reads:
>
> > "The period of minority extends in . . . females to the age of eighteen years; . . ."

and, that such statutory construction was consistent with the intent of the parties as expressed in the Divorce Decree.

> "That [divorce] decree is final and cannot now be changed. At the time the decree was made everybody knew that for almost one hundred years the age of majority for girls was and had been 18. . . ."

It is but proper respect to the wisdom, integrity and patriotism of the supreme judicial body of the State of Utah to presume in favor of the validity of its decision, until its violation of the Constitution is proved beyond a reasonable doubt. Under the searchlight of rational criticism it is evident that the state court decision is consistent with the mandate of their court: First, this Court ruled that "in the context of child support . . . no valid distinction between male and female may be drawn"; second, Article VI, Clause 2, United States Constitution (Supremacy Clause) reads:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every

> State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.";

third, there is no question that the supremacy of this Court's judicial power extends to this case. *Martin v. Hunter's Lessee,* 14 U.S. 121, 1 Wheat 304 (1816); *Cohens v. Virginia,* 19 U.S. 120, 6 Wheat 264 (1821); fourth, the Utah Supreme Court held that for purposes of child support the age of majority for females is age 18; fifth, *ipso facto,* the age of majority for males for purposes of child support is, of necessity, age 18; and sixth, the lower state courts have so interpreted the Utah Supreme Court decision and are now so ruling. Therefore, the state court has complied with this Court's mandate to determine "when the [supporting parties'] obligation for his [her] children's support, pursuant to the divorce decree, terminates under Utah law, and the substantial federal question which did exist is now resolved. In view of the absence of a substantial federal question, the appeal should be dismissed.

POINT II

DETERMINATION OF THIS APPEAL, OTHER THAN A DISMISSAL, WOULD VIOLATE THIS COURT'S POLICY AGAINST PREMATURE CONSTITUTIONAL ADJUDICATIONS.

Appellant argues, in the abstract, that the Utah Supreme Court has revalidated the constitutionality of former Section 15-2-1, Utah Code Annotated (1953) in violation of the decision of this Court that the statute violated the equal protection clause and was therefore unconstitutional. Such an argument is hypothetically feasible, especially if

one plays upon the superfluous, but bombastic, language of Justice Ellett. However, this Court has consistently ruled that "a hypothetical threat is not enough" *Electric Bond & Share Co. v. S.E.C.,* 303 U.S. 419, 58 S.Ct. 678, 82 L.Ed. 936 (1938); that a *real* issue must be present, in contract with a speculative, hypothetical or moot issue. For many years it has been the prudent policy of this Court's "considered practice not to decide abstract, hypothetical or contingent questions," *Alabama State Federation of Labor v. McAdory,* 325 U.S. 450, 461, 65 S.Ct. 1384, 89 L.Ed. 1725 (1945); and, that a party may not maintain a suit "for a mere declaration in the air." *Giles v. Harris,* 189 U.S. 475, 486, 23 S.Ct. 639, 47 L.Ed. 909 (1903).

Clearly, any subsequent adjudication, at this time, would be premature and against the policy of this Court.

In *Republic Natural Gas Co. v. Oklahoma,* 334 U.S. 62, 68 S.Ct. 972, 92 L.Ed 1212, 1221 (1947) this Court stated:

> "The policy against premature constitutional adjudications demands that any doubts in maintaining this burden be resolved against jurisdiction. See citation of cases in the concurring opinion of Mr. Justice Brandeis in *Ashwander v. Tennessee Valley Authority,* 297 U.S. 288, 341, 345, 348, 56 S.Ct. 466, 80 L.Ed. 688, 707, 709 (1936).

In *Ashwander v. Tennessee Valley Authority,* at 711-712, we read:

> "2. The Court will not anticipate a question of constitutional law in advance of the necessity of deciding it. [Citations omitted] . . . It is not the habit of the Court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case. [Citations omitted]

> "3. The Court will not formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied. [Citations omitted]
> . . .
>
> "4. The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of. . . ."

Looking strictly to the issue before the Utah Supreme Court and its holding, putting aside the Barnumism and surplus language of Justice Ellett, it is evident that the state court complied with the mandate of this Court and that any questions which might arise out of that opinion are, at this time, conjectural, hypothetical and abstract. The Motion to Dismiss should be granted not only on the basis that any other action would be premature, but that a contrary decision would unnecessarily waste this Court's time, energy and taxpayer's money.

POINT III

APPELLANT'S CLAIM FOR COSTS AWARDED BY THIS COURT IS MOOT.

Appellant contends that the state court decision deprived her of costs awarded to her by this Court in the amount of Four Hundred Thirty-Seven and 38/100 Dollars ($437.38). This Court has explained in the past that it will not decide moot cases because "there is no subject matter on which the judgment of the court can operate." *Ex Parte Baez,* 177 U.S. 378, 390, 20 S.Ct. 673, 44 L.Ed. 813 (1900). A case may become moot because of some act of the parties which works to dissolve the controversy. *Commercial Cable Co. v. Burleson,* 250 U.S. 360, 39 S.Ct. 512, 63 L.Ed. 1030 (1919); *A. L. Mechling Barge Lines v. United States,* 368 U.S. 324, 82 S.Ct. 337, 7 L.Ed. 317 (1961); and *S.E.C. v. Medical Committee for Human Rights,* 404 U.S. 403, 92 S.Ct. 577, 30 L.Ed. 560 (1972).

The Utah Supreme Court decision did not deny appellant of costs awarded to her by this Court. Appellee recognizes that the Four Hundred Thirty-Seven and 38/100 Dollars ($437.38) awarded to appellant are due and owing and agrees to pay said amount. Accordingly, the controversy over that amount is rendered moot and any complaint which appellant might have had is laid to rest. For the same reason this Court should dismiss appellant's appeal.

CONCLUSION

The appeal should be dismissed and/or the judgment below affirmed for three reasons: First, appellant has failed to present a substantial federal question; second, at best, appellant has only presented a hypothetical argument. Appellant has not formulated a justiciable controversy that has had fruition in action of a definite and concrete character constituting an actual, imminent or likely interference with the mandate and decision of this Court, the supremacy clause or the equal protection clause; and third, the controversy as to court costs is moot.

The foregoing is sufficient to warrant this Court's dismissal of the appeal invoked pursuant to 28 United States Code, Section 1257(2) or in the event the Court does not consider appeal the proper mode of review, to deny a petition for certiorari taken pursuant to 28 United States

Code, Section 2103 or a motion and petition for a writ of mandamus pursuant to 28 United States Code, Section 1615 (a) and Rule 31, Rules of Supreme Court.

Respectfully submitted,

D. GARY CHRISTIAN
of
KIPP AND CHRISTIAN

IN THE SUPREME COURT OF
THE STATE OF UTAH

Thelma B. Stanton, *Plaintiff and Respondent,* v. James Lawrence Stanton, Jr., *Defendant and Appellant.*	No. 14268 FILED June 23, 1976

Allan E. Mecham, Clerk

ELLETT, Justice:

This appeal challenges a judgment awarding $2,700 child support to plaintiff; together with interest and costs. The award was made for a daughter of the parties for a period ensuing after her eighteenth birthday, and culminating at her twenty-first birthday. Statutory references are to U.C.A. 1953.

In November of 1960, defendant, pursuant to an original decree of divorce, was ordered to pay plaintiff $100 per month support payments for each of the minor children of the parties. There were two children, a daughter, who was born February 12, 1953, and a son, whose birth date was January 29, 1955. Upon the daughter attaining the age of 18 years, the father, defendant, ceased paying child support for her. Subsequently, the mother, plaintiff, filed a motion for entry of judgment against defendant for $2,700, the sum of which had accumulated since the eighteenth birthday of the daughter. The trial court denied the motion on the ground that the obligation to support, under the

decree, terminated at the time the daughter attained her majority.

Plaintiff appealed to this court on the ground that the statute[1] created an unconstitutional classification in violation of the equal protection clause of the Fourteenth Amendment. This court found the statutory classification and affirmed the trial court.[2]

Plaintiff appealed the decision of the United States Supreme Court, which ruled that the classification set by 15-2-1 denied equal protection of the laws, as guaranteed by the Fourteenth Amendment.[3] However, the court observed that its holding did not terminate the controversy as it was the prerogative of the state court to determine when defendant's obligation for his children's support pursuant to the divorce decree terminated under Utah law. The matter was remanded to this court, and in turn, the case was remanded by this court to the trial court for further proceedings.

The territorial Legislature of Utah in the lawful performance of its duty enacted Section 1035, C.L.U. 1876, which reads:

> The period of minority extends in males to the age of twenty-one years and in females to that of eighteen years;
> . . . .

The identical language has been carried in our law ever since.

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[1] Sec. 15-2-1, U.C.A. 1953.
[2] Stanton v. Stanton, 30 Utah 2d 315, 517 P.2d 1010 (1974).
[3] Stanton v. Stanton, 421 U.S. 7, 43 L.Ed. 2d 688, 95 S.Ct. 1373 (1975).

Obviously the two provisions of the statute are separable and the Supreme Court of the United States in remanding this matter directed that we decide which age was correct and then legislate a bit on our own and say that the age of majority so chosen for the one sex is also the age of majority for the other sex.

The oath we took when chosen as justices of the Supreme Court of Utah forbids us to encroach on the duties and functions of the legislature. However, we need not make any such determination. The age of the male child in this divorce case has never been called into question. Counsel for the ex-wife raises a question as to when the girl child became of age. The Supreme Court never held that she did not become of age when she reached the age of 18 years.

We have said too many times to require citations that a statute is presumed to be valid unless it clearly appears to be in conflict with some provisions of the Constitution. One looks in vain for some provision of the Constitution which says a girl does not become of age at age 18, and so we must hold that a girl does reach her majority at that age.

The Legislature of Utah, in an attempt to satisfy the justices of the Supreme Court of the United States, passed an amendment to Section 15-2-1, U.C.A. 1953, so that it now reads:

> The period of minority extends in males and females to the age of eighteen years; . . .

It thus is obvious that the statute holding that girls attained their majority at age 18 was unconstitutional.

The claim is made that a difference in the age at which a person attains majority is a denial of equal protection of the law. Even if that be true, the constitutionality of a statute can be raised only by one who had an interest in the lawsuit. Neither the boy nor the girl is a party to, nor intreested in, this matter. It is only the parents who are fussing about who is obligated by the decree to give support. There is no question about the fact that each child has been properly supported.

By our statute[4] both parents are charged equally with the duty to support and educate the children. The question before us is the interpretation to be given to the decree of divorce from which no appeal has ever been taken by either party. That decree is final and cannot now be changed. At the time the decree was made everybody knew that for almost one hundred years the age of majority for girls was and had been 18. The judge and the parties to this proceeding all assumed that when the decree stated that the father should be the one to furnish the support for the children during their minority it meant that the father should furnish the support for the son until he reached 21 and for the daughter until she reached age 18. No honest interpretation of that decree can be made to the contrary.

If the girl needs support after age 18, then if she be a minor, as claimed by the mother (which she is not), each parent is liable for her support and the burden cannot be cast upon just one of them.

If in a proper case it could be held that it is a denial of the equal protection of the law to recognize that there

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[4] 30-2-9, U.C.A. 1953.

is a difference in age when the sexes mature, would it not also be a denial of equal protection to enable a female to marry at age fourteen while the male in order to marry must be 16?

Regardless of what a judge may think about equality, his thinking cannot change the facts of life. The records of the marriage department in Salt Lake County show that 62 per cent of all women who get married do so between the ages of 14 and 21, while only 25 per cent of the men who marry are under 21 years of age.

To judicially hold that males and females attain their maturity at the same age is to be blind to the biological facts of life.

The order of the trial court is reversed and costs are awarded to the appellant.

HENRIOD, Chief Justice: (Concurring)

I concur in the main opinion's conclusion that this court cannot accept the decision of the lower court in determining in effect, apparently, that a female is a minor until she is 21, as to the right of support, simply because a male has been considered such by our legislature agencies ever since this writer's memory runs to the contrary not. I agree also, that the mandate of the U.S. Supreme Court may be well intended but is somewhat wanting in specificity, apparently inviting this court to set an age to determine when support for children ends in divorce cases. This, in my opinion, is not the luxury of this court, but that of the legislative branch, nor that of the common law, since by that law there appears to have been more than one

age for adulthood, with respect to males, females, criminals (of either sex), for being raped, statutorily or otherwise, etc.

Because this court upholds an award for support of a female child until she becomes 18, but not thereafter, certainly is no matter of res judicata as to the fact, therefore, that a male (who is not particeps here), is entitled to support, in a divorce, only until he is 18, — or that a female is entitled to support until she is 21, because he is so entitled.

The mandate of the U.S. Supreme Court is evidenced by its wording that:

> The appellee claims that any unconstitutional inequity between males and females is to be remedied by treating males as adults at age 18, rather than by withholding the privileges of adulthood from women until they reach 21. This is an issue of state law to be resolved *by the Utah courts on remand*. . . . The appellant, although prevailing here on the federal constitution issue, may or may not ultimately win her lawsuit.

Logic would seem to require that if this be the issue, it is just as much an issue, so far as constitutionality is concerned, to say that inequality "is to be remedied by treating males as adults at age 19.5, rather than by withholding the privileges of adulthood from women until they reach 19.5."

The courts of Utah did not set the ages of 21 and 18 respectively for males and females. A statute did that, and the remand mandate that the age of these people "is an issue of state law to be resolved by the Utah courts," historically has not been considered as an acceptable legal

concept by our State judiciary. Our Utah legislature has tried to satisfy the mandate of the U.S. Supreme Court by setting an age certain for both sexes as pointed out in the main opinion, and I am of the opinion that if this court literally carried out the Supreme Court's remand "for further proceedings in conformity with the opinion of this court," we could set the date of adulthood, and therefore that up to which support would be obligatory at 18, 19.5, or 26, — and thus fly in the teeth of our own legislature's already enacted legislative interdiction.

CROCKETT, Justice: (Concurring)

I concur, adding the following comments:

What seems to have been almost lost sight of here is that we are dealing primarily with a controversy between two parties: the plaintiff and the defendant; and only incidentally with a universality of law.

Focusing attention directly upon the rights of the parties as they are involved in this lawsuit, there are certain principles which should be considered and applied. In the first place, as has many times been said, matters relating to the family and the support of children are equitable.[1] Wherefore, the defendant, against whom this judgment is sought, is entitled to have the considerations of equity and good conscience examined and applied in his behalf.

At the time of the entry of the decree, which ordered the defendant to pay $100 per month for each of the minor

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[1] Sec. 30-3-5, U.C.A. 1953; Walton v. Coffman, 110 Utah 1, 167 P.2d 97.

children of the parties, our Statute Section 15-2-1, U.C.A. 1953, provided:

> The period of minority extends in males to the age of twenty-one years and in females to that of eighteen years.

It could not be plainer that under both the statutory and decisional law of this State as it existed at the time the decree was entered, and therefore as was necessarily in the contemplation of the parties, and of the trial court, the only obligation it imposed upon the defendant was that he pay the $100 per month until his daughter Sherri was 18. Further, it is not shown that there has been any substantial change in facts upon which to justify changing the decree as so made and intended.

Other important facts in the total picture are: that the defendant has fulfilled the duties required of him by the decree; and that the effect of this decree is to impose an added burden upon him which he had no obligation to anticipate or plan for. It does not now confer any benefit upon his daughter, but requires him to reimburse the plaintiff for three years' additional support at $100 per month, total $3,600, plus interest thereon. This is not consistent with the objectives of an award of support money. Its purpose is to provide for the current and ongoing necessities of life for the dependent children; and it is not to provide a means for the accumulation of a burdensome debt upon one charged with the duty. Indeed under circumstances where the interests of justice dictate that it would be unfair or unconscionable to do so, the court may restrain the enforcement of such an accumulated debt. See Mason v. Mason, 148 Ore. 34, 34 P.2d 328; Franklin v. Franklin, 83 U.S. App. DC. 385, 171 F.2d 12; Wassung v. Wassung,

136 Neb. 440, 286 N.W. 340; Parenti v. Parenti, 71 R.I. 18, 41 A.2d 313. For the above stated reasons it is even more true that the court should not retroactively place such a burden upon the defendant.

Considering only the rights as between the plaintiff and defendant, in my judgment it is discordant to principles of equity and justice to add such a substantial burden upon the defendant by an ex post facto change of the rules during the game. For these reasons, in addition to those stated in the main opinion and in the concurrence of Chief Justice Henriod, I join in the decision reversing the judgment.

MAUGHAN, Justice: (Dissenting)

This appeal challenges a judgment awarding $2,700 child support to plaintiff; together with interest and costs. The award was made, for a daughter of the parties; for a period ensuing after the eighteenth birthday of the girl, and culminating at her twenty-first birthday. We should affirm. Statutory references are to U.C.A. 1953.

In November of 1960, defendant, pursuant to a decree of divorce, was ordered to pay plaintiff $100 per month support payments for each of the minor children of the parties. There were two children, a daughter, who was born February 12, 1953; and a son, whose birth date was January 29, 1955. Upon the daughter attaining the age of 18 years, the father, defendant, ceased paying child support for her. Subsequently, the mother, plaintiff, filed a motion for entry of judgment against defendant for $2,700, the sum of which had accumulated since the eighteenth

birthday of the daughter. The trial court denied the motion on the ground the obligation to support, under the decree, terminated at the time the daughter attained her majority, which status was set forth in 15-2-1, U.C.A. 1953, as it then existed.

15-2-1 provided:

> The period of minority extends in males to the age of twenty-one years and in females to that of eighteen years.[1]

Plaintiff appealed to this court on the ground the statute created an unconstitutional classification in violation of the equal protection clause of the Fourteenth Amendment. This court found the statutory classification reasonable and affirmed the trial court.[2]

Plaintiff appealed the decision by the United States Supreme Court, which ruled the classification set by 15-2-1 denied equal protection of the laws, as guaranteed by the Fourteenth Amendment.[3] However, the court observed that its holding did not terminate the controversy as it was the prerogative of the state court to determine when defendant's obligation for his children's support pursuant to the divorce decree terminated under Utah law. The matter was remanded to this court, and in turn, the case was remitted to the trial court for further proceedings.

On appeal, defendant contends the trial court did not have authority to order payment of child support after

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[1]This statute was amended in 1975, ch. 39, sec. 1, and currently provides: "The period of minority extends in males and females to the age of eighteen years; but all minors obtain their majority by marriage. It is further provided, that courts in divorce actions may order support to age 21."

[2]Stanton v. Stanton, 30 Utah 2d 314, 517 P.2d 1010 (1974).

[3] Stanton v. Stanton, 421 U.S. 7, 43 L.Ed. 2d 688, 95 S.Ct. 1373 (1975).

the child attained the age of 18. Defendant urges two alternatives. First, this court may determine the constitutional infirmity does not invalidate the statute in its entirety; but rather, the statute may be construed to confer the benefit of emancipation, upon both classes male and female at the age of 18. Second, if this court determines there was no governing statute in effect, then the age of majority should be set at 18 years in conformity with the national trend.

Although the explicit reason for the action of the trial court is not set forth, its judgment can be sustained under two theories. It should be emphasized the invalidity of the statutory classification was strictly confined to its effect concerning child support, and the issue of the instant matter is so limited.

Under one theory, if the statute be deemed void, the common law "shall be the rule of decision in all courts of this state." (68-3-1) Under the common law both male and female attain their majority at the age of 21 years.[4]

Under the second theory, rather than invalidating the entire statutory scheme, where a classification has the effect of unreasonably granting a benefit to one class and denying it to another, the benefit may be extended to the excluded class. A reviewing court may correct a discriminatory classification by invalidating only the invidious exception or exemption and thus extend statutory benefits to those whom the legislature improperly excluded.[5]

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[4]42 Am. Jur. 2d, Infants, Sec. 3, p. 10.

[5]In Re Kapperman, 114 Cal. Rprt. 97, 522 P.2d 657 (1974); Harrigfeld v. District Court of Seventh Judicial District, 95 Idaho 540, 511 P.2d 822 (1973); Moritz v. Commissioner of Internal Revenue (C.A. 10th 1972), 469 F.2d 466.

To extend the benefit of support to females to the age of 21 years is not at odds with legislative expression, or our society as it is. The obligation to pay support under a decree of divorce would coincide with the legal duty of every man and woman to support their children under the Uniform Civil Liability of Support Act.[6] This act defines a child as a son or daughter under the age of 21 years.[7]

After the inception of the matter here for decision, the enactment of 15-2-1 (L. Utah 1975) continued the legislative expression of the Uniform Civil Liability of Support Act, by providing that "courts in divorce actions may order support to age 21." It does such, to the exclusion of the stated ages of majority, therein.

The trial court had the authority to order payment of support, by defendant, for his daughter, beyond her eighteenth birthday. Costs should be awarded to plaintiff.

Tuckett, Justice, concurs in the views expressed in the dissenting opinion of Mr. Justice Maughan.

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[6]L. Utah 1957; 78-45-3, 4.
[7]78-45-2(4).

MAILING CERTIFICATE

I hereby certify that I mailed three copies of MOTION TO DISMISS to Bryce E. Roe of Roe and Fowler, attorneys for appellant, Thelma B. Stanton, 340 East Fourth South, Salt Lake City, Utah 84111, this 10th day of November, 1976.

D. GARY CHRISTIAN
Attorney for Appellee,
James Lawrence Stanton, Jr.